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IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,

Petitioners,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE HONORABLE WENDY DAVIS, TERESA FEDOR, LUCY FLORES, AND JUDY NICASTRO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are distinguished current or former women legislators who have publicly disclosed their own decisions to terminate pregnancies. Their courage in sharing their personal narratives has broadened the public's understanding of why reproductive freedom is so vital to the women of this nation.

The Honorable Wendy Davis is a former Texas State Senator. In 2013, she famously stood for nearly thirteen hours to filibuster Senate Bill 5, an earlier, virtually identical version of the statute at issue here. Senator Davis later published a memoir explaining that her stand was inspired in part by her own experience in terminating two pregnancies for health reasons.

The Honorable Teresa Fedor is currently a member of the Ohio House of Representatives and a former member of the Ohio Senate. Previously, she served her country for six years in the U.S. Air Force and Ohio Air National Guard, and became pregnant after being raped during her military service. During a legislative debate over an Ohio abortion bill that sought to ban abortions as early as six weeks into a pregnancy—with no exceptions for victims of incest or rape—Representative Fedor spontaneously described her own decision to end the pregnancy re-

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioners and respondents both have consented to the filing of this brief.

sulting from the crime that had been committed against her.

The Honorable Lucy Flores is a former member of the Nevada State Assembly and a current candidate for the U.S. House of Representatives. During a legislative debate on a bill to reform the sex education curriculum in Nevada schools, Assemblywoman Flores volunteered the story of her own choice, when she had been an unwed teenager, to terminate an unplanned pregnancy.

The Honorable Judy Nicastro is a former Seattle City Councilwoman. In 2013, Councilwoman Nicastro published the heart-wrenching account of her decision to abort one of a pair of twin fetuses at twenty-three weeks because of a life-threatening condition.

Amici are exemplars of the millions of women of all faiths, educations, income levels, and ethnic backgrounds who, for wide-ranging reasons, have exercised their rights to reproductive freedom. They also bring to this matter valuable first-hand experience with abortion legislation and pretextual efforts by state legislators to prevent women from accessing abortions by invoking unsupported concerns about women's health.

Amici's own life experiences offer strong support for the Petitioners' position. They were able to obtain abortions without the burdens of delay, travel, and expense that H.B. 2 would impose on Texas women. Unless it is reversed, the Fifth Circuit opinion would further embolden legislators to concoct sham justifications for restricting the constitutional rights of women, notwithstanding the lack of any legitimate empirical or factual basis for doing so.

SUMMARY OF ARGUMENT

I. One of the *amici*, Senator Wendy Davis, threw down the gauntlet during the legislative debates that led to the passage of House Bill 2 ("H.B. 2") by demanding that her Senate colleagues prove that abortion clinics and procedures in Texas failed to safeguard women's health. The challenge was not answered. As the District Court correctly found, data maintained by Texas's Department of State Health Services ("DSHS") demonstrates that abortion clinics in Texas did an excellent job of protecting the health of Texas women: (i) there were *no* maternal deaths related to legal abortions between 2009 and 2013; (ii) fewer than one out of every thousand women who underwent a legal abortion in Texas in 2013 reported any medical complications; and (iii) for at least the past five years, DSHS had not revoked or suspended the license of a single abortion facility for noncompliance with its strict health and safety regulations. *See infra*, I.A. Yet the legislators who supported the abortion-related provisions of H.B. 2, supposedly seeking to improve "women's health," did not bother to look at these crucial, readily available data from their own State's expert agency. Instead, they had other goals. As the Texas Lieutenant Governor and President of the Senate, David Dewhurst, admitted, the real purpose of the legislation was to "essentially ban abortion statewide" by forcing the closure of the vast majority of clinics throughout the State. *See infra*, I.B. The overwhelming data, together with these explicit statements, confirm that professed concerns for "women's health" were nothing more than window-dressing for the passage of H.B. 2.

II. Notwithstanding the millions of women who have terminated a pregnancy in this country, social stigma and fears of backlash discourage all but a select few from recounting their stories in a public forum. As a result, false stereotypes persist in society and in state legislatures regarding women who exercise their right to choose. The reality is that approximately one out of every three women in this country has had an abortion in her lifetime. The women who have had abortions are both single and married. They are young and middle-aged. They are rich and poor. They are of every faith and every walk of life. Many are already parents trying to support their families. The stories of the *amici*—the Honorable Wendy Davis, Teresa Fedor, Lucy Flores, and Judy Nicastro—who have come out with their own decisions to terminate a pregnancy, illustrate this diversity. Each of the *amici* went to a nearby doctor's office or clinic for the procedure, an option that will not be available to many Texas women should H.B. 2 remain law. *See infra*, II.

A decision affirming the Fifth Circuit's opinion would not only produce a devastating setback for the availability of abortion in Texas and other states, but would also give license to legislators to run roughshod over constitutional freedoms so long as they can articulate an appealing-sounding purpose for doing so—even if that purpose has no empirical or factual basis, as is the case here.

ARGUMENT

I. Texas's Legislation Restricting Abortions Supposedly Seeks to Resolve an Illusory "Women's Health" Problem Without Any Empirical or Factual Basis.

Texas legislators insist that they enacted H.B. 2 to address an abortion-related "women's health" problem. However, as contemporaneous statements by the President of the Texas Senate and data on the safety of abortion procedures in Texas show, this justification was just camouflage for their real goal—to restrict the availability of safe and legal abortion services.

A. Texas Legislators Ignored The State's Own Data Showing That Abortion Clinics and Procedures Were Already Safe.

During the debate over an earlier version of H.B. 2 (denominated "Senate Bill 5" or "S.B. 5"),[2] one of the *amici*, Texas Senator Wendy Davis, challenged her Senate colleagues to support their claim that legislation was needed to protect "women's health" in the absence of any evidence that Texas's clinics were unsafe in the first place:

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[2] Senate Bill 5 and House Bill 2 are virtually identical. Senate Bill 5 was the legislation that was successfully filibustered by Senator Wendy Davis. Although Senate Bill 5 ultimately failed, it was re-introduced three days later during a second special session and designated House Bill 2, the statute at issue here.

> The ambulatory surgical center requirement has no basis in medical fact or science that necessitates the need for a woman to have an abortion procedure there. And in fact, you will probably recall numerous times I asked [the bill's sponsor] Senator Hegar to provide some empirical evidence for us to understand what was unsafe in the clinical setting today and how that would be made safer by virtue of this bill. And he was not able to provide any information to answer this question.
>
> That same question I'm aware was asked in the House hearings on this particular bill and it was asked in the Senate hearings on this particular bill. And what we know—and I think we would agree—is that today, out of the 42 clinics that provide safe, legal abortion for women in Texas, only 5 of those currently satisfy the conditions of the ambulatory surgical center . . .
>
> But absent any justification, any reason that demonstrates why somehow, these centers would provide better healthcare—I have to ask myself the question, and I know so many other women in Texas are asking themselves the question: to what purpose, then does this [bill] serve? And could it be—might it just be—a desire to limit women's access to safe, healthy, legal, constitutionally protected abortions in the state of Texas?

Transcript of Texas Senate Session on Senate Bill 5 (Jun. 25, 2013), transcribed by A. Mardoll,

https://docs.google.com/document/d/1c0xuAFFc_6klQ1nrnQ72Qd9Y-o_uG8rSykO4wDgNqFQ/edit.

Senator Davis's challenge went unanswered, and for good reason. As the district court correctly concluded, "[t]he great weight of the evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Pet. App. 145a.

The data overwhelmingly support the district court's conclusion. The Texas DSHS regularly gathers, reviews, and analyzes data regarding the safety of abortion clinics and procedures in Texas. These data help show the safety of abortion clinics and procedures in Texas prior to the passage of H.B. 2.

First, DSHS reported that there were no abortion-related maternal deaths in Texas between 2009 and 2013, the most recent year for which the data are available. *See* J.A. 273 (citing Texas DSHS, Vital Statistics Annual Reports, 2001-2012); Texas DSHS, Vital Statistics Annual Report, 2013, Table 33 Selected Characteristics of Induced Terminations of Pregnancy by Texas Residents, http://www.dshs.state.tx.us/chs/vstat/vs13/t33.aspx. The Texas data are consistent with national statistics showing that the abortion-related mortality rate was less than 0.7 deaths per 100,000 procedures, which is comparable to the risk of death following a miscarriage. J.A. 200, 263-64.

Second, the Texas DSHS data show that five hundredths of one percent of women who underwent legal abortions in Texas in 2013 (*i.e*, five out of every ten thousand women) reported any complications.

Texas DSHS, Vital Statistics Annual Report, 2013, Table 33 Selected Characteristics of Induced Terminations of Pregnancy by Texas Residents, http://www.dshs.state.tx.us/chs/vstat/vs13/t33.aspx.[3] Even for those few women who did suffer complications, there is no evidence in the legislative record that the admitting privileges or hospital-grade facilities mandated by H.B. 2 would have produced any better health outcomes for these patients.

Third, DSHS, which thoroughly monitors and inspects Texas abortion clinics pursuant to strict State regulations, reported in its response to a congressional inquiry that it had not suspended or revoked the license of any Texas abortion facility between 2008 and 2013 for failing to comply with safety policies or procedures. Letter from K. Janek, M.D., Texas Health and Human Services, to U.S. House of Rep. Comm. On Energy and Commerce Members, at 3 (Jun. 28, 2013), *available at* http://rhrealitycheck.wpengine.netdna-cdn.com/wp-content/uploads/state-abortion-docs/Departments-of-Health/Texas/Texas_Department_of_Health_1.pdf.[4]

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[3] Respondents contend that these data are underreported and unreliable. However, in a letter responding to a Congressional inquiry in 2013 prior to the present litigation, DSHS never raised any concerns regarding any data quality issues. *See* Letter from K. Janek, M.D., Texas Health and Human Services, to U.S. House of Rep. Comm. On Energy and Commerce Members (Jun. 28, 2013), *available at* http://rhrealitycheck.wpengine.netdna-cdn.com/wp-content/uploads/state-abortion-docs/Departments-of-Health/Texas/Texas_Department_of_Health_1.pdf.

[4] "In accordance with state licensing rules, DSHS inspects each abortion facility in Texas annually. Investigators are trained to

Stated another way, the Texas regulators charged with protecting the health of Texas women believed that Texas's abortion clinics were safe.

In the push to pass H.B. 2 in the supposed name of "women's health," the bill's legislative advocates never stopped to study these data, which were right at their fingertips from their own State regulatory watchdog. One legislator, who classifies herself as "strongly pro-life" but who voted against the Senate version of the bill, remarked:

> Considering that the medical specialists associated most closely with women's reproductive health stand opposed to the legislation, and considering the high level of regulation and safety related to abortion services in Texas today, *advocates for SB 5 failed to make the case that this bill is necessary*. . . . The Legislature should not sub-

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use observation, interviews, and record review in the onsite process to determine compliance. While on-site, DSHS investigative staff starts with a tour of the facility, which includes an inspection of procedure rooms to ensure that the facility complies with acceptable infection control protocols. DSHS reviews the facility's internal policies, as well as a sample of patient medical records. The investigator interviews facility staff to determine whether the facility is operating in accordance with the facility's established policies and procedures, to ensure staff is knowledgeable of such, and to ascertain whether the facility complies with state licensing rules. In facilities that provide surgical abortions, the investigator observes a surgical procedure. . . If a DSHS investigator observes noncompliance, the investigator collects evidence of that noncompliance. If DSHS substantiates a finding of noncompliance, DSHS issues a deficiency report, and, in response, the facility must submit an acceptable plan of correction." *Id.* at 3-4.

> stitute its judgment for that of qualified medical professionals.

Stmt. of Sen. J. Zaffirini Regarding Senate Bill 5, Texas Senate Journal, 84th Cong. Sess. 1 at 69 (Jun. 18, 2013), http://www.journals.senate.state.tx.us/sjrnl/831/pdf/83S106-18-F.PDF (emphasis added).

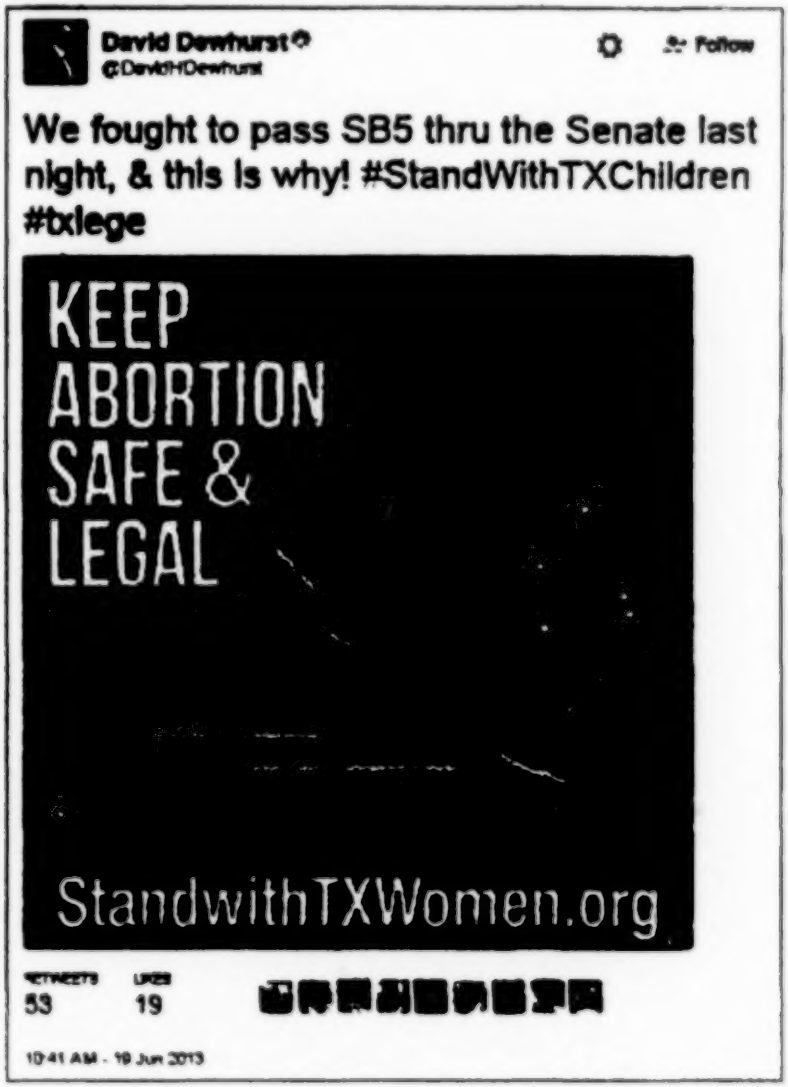
As legislators continuously challenged the bill's author, Senator Glenn Hegar, for evidence justifying the legislation during a floor debate, he was "unable to offer any data on the safety of ambulatory surgical centers versus regular abortion clinics." S. Smith, *Special Procedures*, Texas Monthly (Jun. 19, 2015), http://www.texasmonthly.com/politics/special-procedures. Instead, Senator Hegar's only response was that "in [his] opinion" the legislation would help women. *Id.*

As Senator Davis suggested at the time, the failure by the legislation's advocates to evaluate Texas's own, readily available data on the safety of abortion clinics when they were expressly asked to do so points to another, improper motive—to eliminate the availability of legal, constitutionally protected abortion services in Texas.

B. Contemporaneous Statements Made By the President of the Texas Senate Confirm That H.B. 2's Purpose Was to "Essentially Ban Abortion Statewide."

Statements made by Texas's Lieutenant Governor and President of the Senate, David Dewhurst, expose that the true goal of the legislators who voted for H.B. 2 was, in fact, to close abortion clinics and limit the availability of legal abortions in Texas. In an unguarded moment of candor after the Senate ver-

sion of the legislation that eventually became H.B. 2 was passed, Dewhurst tweeted to his followers: "We fought to pass [Senate Bill 5] thru the Senate last night, & this is why!" followed by a graphic displaying the number of clinics that would be forced to close and crowing that the passage of the bill would "essentially ban abortion statewide." D. Dewhurst, Twitter (Jun. 19, 2013, 10:41 AM ET), https://twitter.com/DavidHDewhurst/status/-347363442497302528. Dewhurst boasted that only five abortion clinics were likely to remain open in Texas thanks, in part, to his handiwork. *Id.*



Id.

Dewhurst later tried to backtrack from his statement by paying lip service to "women's health," but only after his colleagues and the news media caught wind of his original statement. D. Dewhurst, Twitter (Jun. 19, 2013, 1:06 PM ET), https://twitter.com/DavidHDewhurst/status/347400087191814145.

Together with the lack of data showing that H.B. 2 responded to a legitimate need, the statements made by the President of the Texas Senate provide further evidence that the true goal of the law's proponents was to restrict women's constitutional rights.

II. *Amici*'s Narratives Illustrate the Diversity of Women That Have Abortions, Their Reasons for Doing So, and the Importance of Preventing Unnecessary Barriers to Women's Ability to Exercise Their Constitutional Rights.

One in every three women has an abortion during her lifetime.[5] Yet very few women choose to openly discuss their experiences, a reflection of the cultural and social stigma attached to that choice.[6] The resulting silence allows false stereotypes about why and when women seek abortions to persist in state

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[5] S. K. Henshaw, *Unintended Pregnancy in the United States*, 30 Family Planning Perspectives 24-29, 46 (1998).

[6] A. Norris, M.D. PhD et. al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*. Women's Health Issues (Feb. 12, 2011), *available at* https://www.guttmacher.org/pubs/journals/Abortion-Stigma.pdf.

legislatures and elsewhere. The *amici* here—the Honorable Wendy Davis, Teresa Fedor, Lucy Flores, and Judy Nicastro—have come out with their own abortion narratives to show that women of all different circumstances, ages, marital statuses, income levels, and ethnicities exercise their right to choose for a broad range of reasons. They give faces to a woman's right to choose.

A. The Honorable Wendy Davis

Senator Wendy Davis has experienced first-hand the termination of two different pregnancies.

In 1994, Senator Davis had two daughters, ages six and twelve. She was married and in her first year of practicing law after graduating from Harvard Law School and serving as a clerk for U.S. District Court Judge Buchmeyer in Dallas. When she became pregnant, Senator Davis and her husband were ecstatic to learn that she was expecting a baby boy. But a sonogram revealed that the fetus had implanted in a fallopian tube rather than the uterus, in what is known as an ectopic pregnancy. Her doctor told her that her health was at risk if she continued the nonviable pregnancy, as it would result in the fallopian tube rupturing. Senator Davis's only option was to have surgery to remove the affected fallopian tube, which would terminate the pregnancy, and she underwent the procedure.

In 1996, Senator Davis became pregnant again. This time, she was expecting to give birth to a baby girl. In the second trimester, during an ultrasound examination of the fetus, Senator Davis became worried. Her doctor looked at her with shaking hands

and she knew something was wrong. Senator Davis learned that the fetus suffered from an extremely rare, acute brain abnormality known as Dandy-Walker syndrome in which the right and left sides of the fetus's brain had developed in complete separation.

Senator Davis refused to give up hope and sought four different medical opinions, each of which confirmed the fetus's grim condition: the fetus was unlikely to survive delivery, and even if it did, it probably would have been in a permanent vegetative state. Senator Davis and her husband concluded that the most humane and compassionate thing they could do was to spare their daughter, who they named Tate, from the pain and suffering that inevitably would follow her birth. They informed Senator Davis's doctor that they planned to terminate the pregnancy. The procedure was performed at her doctor's office, with Senator Davis's husband at her side.

This excruciating experience was crushing to Senator Davis and her family. They attended group grief counseling with other couples and families who had suffered similar losses. Senator Davis had grown up as a devout Episcopalian and she also turned to religion to help her cope with the tragedy. She and her family were profoundly changed by the experience. But although she became a public figure in Texas, Senator Davis initially did not share her story or her grief with her constituents.

Senator Davis was a member of the Texas Senate when Texas passed the Senate version of H.B. 2, which eventually became the legislation at issue in this litigation. During a Senate hearing on the bill, she famously stood in her pink sneakers for nearly

thirteen hours to filibuster the bill and give a voice to women across Texas who sought to preserve their constitutional rights to a legal abortion.

During the course of the filibuster, Senator Davis read from some of the many stories that her constituents and other Texans had sent to her, recounting their own abortion narratives. One story in particular—from a woman named Carole M.—hit close to home. Carole M. and her husband had just married, and they were ecstatic to be expecting their first child, a baby girl. At twenty weeks, they went to the doctor to learn the sex of the baby. That is when they learned that the fetus suffered from a terminal condition, hydrops fetalis, in which an abnormal amount of fluid builds up in the body. Carole M. wrote that she felt like her "soul had been ripped apart" when doctors delivered the news. Painstakingly, Carole M. and her husband decided that terminating her pregnancy was in the best interest of the fetus and their family. Carole M.'s letter explained how much it mattered that she had the freedom to make this important choice:

> I chose to have a baby and to bring her into this world. I should be allowed to make the very personal, very private, and very painful decision as to how she leaves it, guided by the best interest of my child and my family. If a twenty-week ban had been in place four years ago, then I wouldn't have been able to make this choice. Waiting for your child to pass is certainly a viable option for many who have been in my posi-

> tion. But so is the path that I chose and would choose again.

Wendy Davis, FORGETTING TO BE AFRAID: A MEMOIR 274–75 (2014) (quoting letter from Carole M.).

As she read Carole M.'s story out loud on the floor of the Texas Senate, Senator Davis's voice faltered. She realized that she could no longer remain silent about her own abortion of a fetus with a fatal condition.

Senator Davis went on to publish a memoir in which she has shared the details of both of her terminated pregnancies. The resulting backlash illustrates why the many women who have had abortions choose to stay in the shadows. Senator Davis has been mocked as "Abortion Barbie." While attending a political event in Los Angeles, she was greeted by life-sized posters throughout the city of "Abortion Barbie Wendy Davis" dolls holding scissors in their hands with plastic fetuses in their uteruses. Additionally, to this day, whenever Senator Davis posts a message on Twitter, regardless of the topic, she gets responses accusing her of "murdering babies." Despite this backlash, Senator Davis continues her push to protect women's constitutional rights.

B. The Honorable Teresa Fedor

Teresa Fedor's political career has been driven by her passionate commitment to serve the children and women of Ohio.

In 1975, at age eighteen, Representative Fedor and her then-husband joined the U.S. Air Force. Four years later, she was a divorced single mother,

pursuing a college degree in education at the University of Toledo while also serving in the Ohio Air National Guard. After getting her degree, she worked with children for eighteen years as an elementary school teacher.

Representative Fedor was first elected to the Ohio House of Representatives in 2000 and continues to serve there today. The protection of vulnerable Ohio children has been the driving force for her years of public service. Among many other things, she has championed legislation aimed at improving the education system in Ohio, curtailing cyberbullying of schoolchildren, requiring background checks for volunteer coaches, enhancing penalties for human trafficking, and ensuring that children of military personnel are given the same educational opportunities as other children.

Representative Fedor struggled to advocate for legislation that could improve the lives of women and children in Ohio, such as reducing infant mortality, providing for quality daycare and affordable education, and requiring comprehensive sex education in schools. Over the years, she saw these issues sidelined as the legislative agenda was increasingly shaped by her colleagues' efforts to undermine women's reproductive rights. Representative Fedor believed that her legislative colleagues were responding to well-organized and politically active anti-abortion groups, to the detriment of the real welfare of their constituents.

In March 2015, the Ohio House of Representatives was considering one such effort to erode women's constitutional rights. The bill being debated was

a "fetal heartbeat" bill that would outlaw abortion once a fetal heartbeat could be detected, which could occur as early as six weeks into a pregnancy. It contained no exceptions for pregnancies resulting from rape or incest. One after the other, her male colleagues rose to offer anecdotes in support of the bill, not once mentioning the missing exception.

Unknown to her fellow representatives, Representative Fedor knew first-hand the importance of allowing abortions in cases of rape. More than thirty years earlier, when she was a single mother serving in the Ohio Air National Guard, Representative Fedor had been raped by an active duty member of the Air Force. She had never brought charges for this crime, concerned that women in her situation are "more often blamed than believed." When she learned that she had become pregnant, she terminated the pregnancy at a nearby Ohio clinic. The decision was not made lightly—Representative Fedor was the oldest daughter in a Catholic family of seven children—but she felt it was the best decision for her. Representative Fedor was grateful that in the early years after this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), this option was readily available to her. If Texas's H.B. 2 restrictions were in place in Ohio at the time, the long travel would have made it more difficult for Representative Fedor, a single mother and a student, to have the procedure.

In the decades since her rape and abortion, Representative Fedor had confided to only two close family members. But when it was finally her turn to speak on the "fetal heartbeat" bill, Representative Fedor decided that it was time to end the silence.

She rose to chastise her colleagues for ignoring the plight of women who would be affected by the legislation:

> I heard all these stories that just fit your scenario, and I respect that. But you don't respect my reason. My rape. My abortion. And I guarantee you there are other women who should stand up with me and be courageous enough to speak that voice. . . .
>
> [W]hat you're doing is so fundamentally inhuman, unconstitutional, and I've sat here too long. . . . I dare you to walk in my shoes. . . . This debate is political – purely political – and I understand your story, but you don't understand mine. I'm grateful for the freedom [to choose]. It is a personal decision, and how dare government get into my business.

Rep. Fedor's Speech on H.B. No. 69 (Mar. 25, 2015) (video produced by The Ohio Channel), *available at* http://www.toledoblade.com/Politics/2015/03/26/Fedor-reveals-rape-abortion-in-distant-past.html. While delivering this speech, one of Representative Fedor's male colleagues laughed, reinforcing the disrespect for women and their rights that had been shown at the debate on that day.

Representative Fedor's courageous speech did not dissuade her House colleagues from voting to approve the Ohio "fetal heartbeat" bill. Nonetheless, she fights on to press her legislative agenda and is running for re-election so that she may continue the

work of improving the lives of women and children in Ohio.

C. The Honorable Lucy Flores

Assemblywoman Flores was one of thirteen children in her family. She was raised in North Las Vegas; her father was a gardener by day and a mariachi singer by night. Her mother deserted her family when Assemblywoman Flores was only nine years old. As a young teenager, she joined a gang and was arrested before she turned fourteen. She spent ten months in juvenile detention after leading police on a chase in a stolen vehicle through a neighborhood that she later represented in the Nevada State Assembly.

All six of Assemblywoman Flores's sisters had children when they were teenagers. At age sixteen, Assemblywoman Flores herself became pregnant. She was excited initially, and even began to buy baby clothes. But she was poor, she was in high school, and she knew that she was not mature enough to take care of a baby on her own. As much as she loved her sisters and their children, she did not want to put herself or a child through the hardships of poverty, hunger and lack of access to basic healthcare that she witnessed her sisters and their children endure.

After carefully weighing these considerations, Assemblywoman Flores determined that she could not provide for a baby. To this day, "one of the hardest things" she has ever done in her life was to ask her father for $200 to pay for an abortion. With difficulty, her father cobbled together the funds. Unlike the

case for many poor or low income women in Texas after the passage of H.B. 2, she was able to go to a nearby clinic for the procedure. The added expense of travel to a distant city would have been "a barrier" that the sixteen year-old Lucy Flores "would not have been able to overcome."

Assemblywoman Flores later went on to get her GED, graduate from the University of Southern California, and earn her law degree from the Boyd School of Law at the University of Nevada, Las Vegas. In 2011, she was among the first Latinas to serve in the Nevada State Assembly. She is considered a political "rising star," and is now running for a seat in the U.S. House of Representatives.

In 2013, Assemblywoman Flores participated in a legislative hearing on a comprehensive sex education bill. Nevada had some of the worst teen pregnancy rates and teen sexually-transmitted disease rates in the nation. Improving sex education in Nevada schools was a cause near and dear to Assemblywoman Flores's heart, for she believed that she would not have become pregnant if she had access to sex education when she was young. The bill had stalled numerous times in the past and appeared to be going nowhere. In order to illustrate the need for sex education, Assemblywoman Flores spontaneously decided to disclose her own teenage pregnancy and abortion. She explained how an improved sex education curriculum would have better guided her as a young teenager. Boldly, she said that she did not regret terminating her pregnancy, for she would not have been able to support a child, and would not have been able to pursue the education that enabled her to

become a role model for other young women in need of guidance. There was an "audible gasp" in the room when she made her disclosure.

The ensuing backlash shows why so few women in public life venture to disclose their abortion narratives. Assemblywoman Flores got vitriolic messages calling her a "vile human being" and warning that she would soon "meet her maker." She was berated because she had said that she did not regret her decision. Concerned that the threats on her life were real, for a while she refrained from making public appearances and canceled further media interviews.

But Assemblywoman Flores has not let the backlash stop her. During her political campaigns, she has become an "emotion priest," helping many other women open up about their own abortion experiences and fight back against the stigma cast on women who have exercised their right to control their reproductive destiny. Assemblywoman Flores is forever grateful for the transformative role that this crucial constitutional right has played in her life.

D. The Honorable Judy Nicastro

Shortly after Councilwoman Nicastro completed her term on the Seattle City Council, when she was forty years old, she married her husband. The couple wanted to have children, but they had trouble conceiving and turned to *in vitro* fertilization. They succeeded and had one son. Two years later, after more rounds of *in vitro* fertilization, Councilwoman Nicastro and her husband were elated to learn that she was carrying twins, one male and one female.

In the twentieth week of pregnancy, an ultrasound intimated that something may be wrong with the male fetus. Doctors were unable to see its heart, but thought that might be because of the positioning of the fetus. In the twenty-second week of pregnancy, however, an MRI confirmed that the male fetus's organs were in its chest and were not developing properly. The fetus had an inoperable left-side herniated diaphragm.

Councilwoman Nicastro and her husband had been prepared to deal with fetal abnormalities, but this was different. They desperately wanted to do whatever they could to save the male fetus and ensure that he would have a good quality of life. But only one lung chamber had formed and even it was only twenty percent complete. According to the medical team, even if the male fetus were able to survive birth, he would be entirely reliant on life support machines.

To Councilwoman Nicastro and her Catholic husband, the thought of having the male twin gasp for air and linger in pain at birth was a nightmare. Even worse, they feared that the healthy female twin's life would be at risk if they decided to terminate the pregnancy of the male fetus. Ideally, they wanted to wait longer to see if the male's condition would improve and to allow the female fetus to more fully develop. But the State of Washington prohibited abortions after the twenty-fourth week, so that

option was not available to them in their home state.[7]

Agonized by this impossible choice, Councilwoman Nicastro and her husband opted to terminate the male fetus so it would not be born only to suffer. The procedure was performed at a nearby clinic only four miles from their home. Fortunately, no harm was done to the female fetus and Councilwoman Nicastro's daughter, Kaitlyn, was later born, healthy and beautiful.

Councilwoman Nicastro penned a heartfelt and heart-wrenching editorial to tell her story about a painful choice that will "live with me forever." J. Nicastro, *My Abortion, at 23 Weeks*, The New York Times (Jun. 20, 2013), http://www.nytimes.com/-2013/06/21/opinion/my-abortion-at-23-weeks.html. The editorial triggered much needed discussion of the subject of late-term abortions. While some accused Councilwoman Nicastro of "killing" the male fetus, she also received an outpouring of support and messages from women who thanked her for emboldening them to exercise their constitutional rights without shame. Councilwoman Nicastro shared her story "in the hope that our leaders will be more responsible and compassionate when they weigh what it means to truly value the lives of women and children." *Id.*

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[7] Had Councilwoman Nicastro lived in Texas after the enactment of H.B. 2, she would have had to face this difficult choice even earlier—at twenty weeks.

CONCLUSION

Amici's stories show that the reasons women choose abortion are as complex and as varied as the women themselves. *Amici* are grateful that they were able to exercise their constitutional rights in nearby doctor's offices and abortion clinics without the burdens of travel, delay, and additional expense that would be imposed on Texas women if H.B. 2 were to remain in force. The constitutional right to an abortion should not be eroded by legislators using new, deceitful methods and theories to chip away at *Roe v. Wade* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), under false pretenses. The health and wellbeing of women depend on abortion remaining legal, safe, and available, not on imposing unnecessary and pretextual regulatory requirements on physicians and abortion clinics.

For the foregoing reasons, as well as those offered by Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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